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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 PEDRO RODRIGUEZ-CORTEZ,
11
12 Petitioner,
13 v.
14 UNITED STATES OF AMERICA,
15 Respondent.

Case Nos. 3:11-cr-00287-DMS
3:21-cv-00057-DMS

**ORDER DENYING MOTION TO
VACATE, SET ASIDE, OR
CORRECT SENTENCE UNDER
28 U.S.C. § 2255**

16
17 On November 3, 2020, Defendant Pedro Rodriguez-Cortez filed a Motion to
18 Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (ECF No.
19 115.) Respondent filed a Response in Opposition to the motion. (ECF No. 118.)
20 Petitioner filed a “Motion to Respond to the Government Opposition,” which the
21 Court construes as a reply brief. (ECF No. 121.) For the reasons discussed below,
22 the Court **DENIES** the Motion.

23 **I.**

24 **BACKGROUND**

25 On January 25, 2011, Defendant was indicted for (1) attempted illegal entry
26 after deportation, in violation of 8 U.S.C. § 1326, and (2) making a false claim to
27 United States citizenship, in violation of 18 U.S.C. § 911. (ECF No. 8.) A jury
28 found Defendant guilty of both offenses on July 27, 2011. (ECF No. 38.) The Court

1 then sentenced Defendant to (1) 77 months of imprisonment in the custody of the
2 Federal Bureau of Prisons followed by three years of supervised release for
3 attempted entry after deportation, and (2) 36 months of imprisonment followed by
4 one-year of supervised release for making a false claim to citizenship. (ECF No.
5 42.) The sentences were set to run concurrently. (*Id.*) Judgment was entered on
6 October 21, 2011. (ECF No. 43.)

7 Defendant filed a notice of appeal on April 13, 2012. (ECF Nos. 45, 46.) On
8 October 18, 2012, the Ninth Circuit issued an order dismissing the appeal as
9 untimely. (ECF No. 49.) Defendant also filed a second notice of appeal, which the
10 Ninth Circuit construed as a motion for reconsideration and denied. (ECF No. 50.)

11 On December 17, 2012, Defendant also filed his first motion to vacate, set
12 aside, or correct his sentence pursuant to 18 U.S.C. § 2255. (ECF No. 51.) In the
13 motion, Defendant argued that he was unlawfully restrained in violation of the
14 Fourth Amendment, and that his attorney was ineffective for failing to timely appeal
15 his conviction. (*Id.*) On January 2, 2013, the Court denied the motion as untimely.
16 (ECF No. 53.) Defendant filed a notice of appeal on January 14, 2013. (ECF No.
17 54.) On March 13, 2014, the Ninth Circuit vacated the Court's order and remanded
18 the matter for further proceedings to allow Defendant to present his position on the
19 timeliness of his motion. (ECF No 58.) After Defendant submitted briefing on the
20 issue, the Court again denied the motion as untimely and declined to grant Defendant
21 a certificate of appealability. (ECF No. 72.)

22 On July 26, 2016, Defendant was released from prison. *United States v.*
23 *Rodriguez-Cortez*, 16-cr-2834 (S.D. Cal. June 7, 2017), ECF No. 20, at 11. He was
24 subsequently deported and removed to Mexico. *Id.* On November 13, 2016, while
25 still serving his term of supervised release, Defendant was arrested for attempting to
26 enter the United States. *Id.* at 1, 4. The Court issued an arrest warrant for Defendant
27 on January 4, 2017, for failure to comply with the terms of his supervised release.
28 (ECF Nos. 74, 75.)

1 On December 8, 2016, the government filed an information charging
2 Defendant with unlawful reentry of a removed alien, in violation of 8 U.S.C. § 1326.
3 *United States v. Rodriguez-Cortez*, 16-cr-2834 (S.D. Cal. Dec. 8, 2016), ECF No. 8.
4 Defendant pled guilty to the information without a plea agreement on April 28, 2017.
5 *Id.* ECF No. 35. In so doing, Defendant admitted to the factual basis for the plea—
6 including that he is not a citizen of the United States. *Id.* at 5–6. Defendant further
7 affirmed his understanding that he was not entitled to withdraw his plea or his
8 admission to the factual basis for his guilty plea. *Id.* at 10.

9 On July 14, 2017, the Court sentenced Defendant to 84 months of
10 imprisonment to be followed by two years of supervised release for his section 1326
11 violation. *Id.* ECF No. 26. The Court also revoked supervised release for
12 Defendant’s 2011 convictions and sentenced him to six months in custody for
13 violating the terms of his supervised release, to run consecutively to his 84-month
14 sentence. (ECF No. 90.)

15 Defendant appealed both sentences. (*See* ECF No. 95.) On January 24, 2018,
16 the Ninth Circuit vacated Defendant’s sentences and remanded the case for re-
17 sentencing. (ECF No. 102.) On remand, the Court resentenced Defendant to 64
18 months in custody for the conviction arising from his 2016 arrest. *United States v.*
19 *Rodriguez-Cortez*, 16-cr-2834 (S.D. Cal. April 6, 2018), ECF No. 51. The Court
20 also resentenced Defendant to six months in custody for the conviction arising from
21 his 2011 arrest, consecutive to his 64-month sentence. (ECF Nos. 108, 109.) On
22 December 3, 2018, the Ninth Circuit affirmed both sentences. *United States v.*
23 *Rodriguez-Cortez*, 744 Fed. App’x 431 (9th Cir. 2018).

24 On April 15, 2019, the Supreme Court of the United States denied Defendant’s
25 petition for a writ of certiorari. *Rodriguez-Cortez v. United States*, 139 S.Ct. 1584
26 (2019).

27 Finally, Defendant filed the instant motion in the United States District Court
28

1 for the Central District of California on November 3, 2020.¹ (ECF Nos. 115.) The
 2 motion was transferred to this Court on January 12, 2021. (ECF No. 115-1.)

3 II.

4 DISCUSSION

5 The government argues Defendant's motion is barred by AEDPA's statute of
 6 limitations. (ECF No. 118, at 10–11.) The AEDPA provides for a “1-year period of
 7 limitation,” which runs from the date on which the judgment of conviction became
 8 final. *Id.* at § 2255(f)(1). Here, the judgment of conviction became final on April
 9 15, 2019 when the United States Supreme Court denied Defendant's petition for a
 10 writ of certiorari. *See United States v. Schwartz*, 274 F.3d 1220, 1223 (9th Cir. 2001)
 11 (holding that “finality,” for section 2255 purposes, shares the same definition of
 12 “finality” set forth in 28 U.S.C. § 2244(d)(1)); *see also Wixom v. Washington*, 264
 13 F.3d 894, 897 (9th Cir. 2001) (judgment becomes final under section 2244(d)(1) “by
 14 the conclusion of direct review by the highest court, including the United States
 15 Supreme Court”). As such, any motion for relief under section 2255 should have
 16 been filed by April 15, 2020. However, Defendant filed his motion on November 3,
 17 2020, more than six months after the statutory deadline. Therefore, Defendant's
 18 motion is time barred unless he can show that some form of tolling applies to his
 19 case.

20 Defendant does not argue that his motion was timely filed. (*See* ECF No. 115,
 21 at 7.) Instead, Defendant argues that he is entitled to equitable tolling. (ECF No
 22 121, at 3, 23.) Defendant asserts that he failed to file his appeal on time because he
 23

24 ¹ Under the prison mailbox rule, a habeas petition is deemed filed when a party hands
 25 the document over to prison authorities for mailing. *See Huizar v. Carey*, 273 F.3d
 26 1220, 1222 (9th Cir. 2001); *see also United States v. Winkles*, 795 F.3d 1134 (9th
 27 Cir. 2015 (applying the prison mailbox rule to motions filed pursuant to 28 U.S.C. §
 28 2255). This letter was postmarked on November 3, 2020. (ECF No. 115, at 10.)
 Therefore, while the Clerk of the Central District stamped the motion as filed on
 November 6, 2020, it was properly filed on November 3, 2020.

1 lacked “knowledge of the statute of limitations.” (*Id.* at 17.) A movant under section
 2 2255 “is entitled to equitable tolling only if he shows: (1) that he has been pursuing
 3 his rights diligently, and (2) that some extraordinary circumstance stood in his way
 4 and prevented timely filing.” *United States v. Buckles*, 647 F.3d 883, 889 (9th Cir.
 5 2011) (citing *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 2562, 177 L. Ed.
 6 2d 130 (2010)). “The movant must show that the extraordinary circumstances were
 7 the cause of his untimeliness.” *Id.* Generally, “the threshold necessary to trigger
 8 equitable tolling ... is very high.” *Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir.
 9 2006). Here, Defendant makes no showing that he exercised diligence in pursuing
 10 his right to file the present motion. (*See generally* ECF Nos. 115, 121.)
 11 Furthermore, simple ignorance of the law, absent other extenuating factors such as
 12 language barrier or the unavailability of legal materials, is not an excuse for failing
 13 to timely file a motion under section 2255. *See Zambrano-Burgos v. United States*,
 14 2021 WL 1056557, at *5 (S.D. Cal. 2021) (citing *United States v. Aguirre-Ganceda*,
 15 592 F.3d 1043, 1046 (9th Cir. 2010), *Mendoza*, 449 F.3d at 1070). Accordingly, the
 16 Court finds that Defendant is not entitled to equitable tolling.

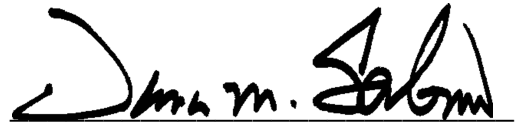
17 The Supreme Court has also recognized an actual innocence exception to the
 18 AEDPA’s statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013)
 19 (“actual innocence, if proved, serves as a gateway through which a petitioner may
 20 pass whether the impediment is a procedural bar, ... or, as in this case, expiration of
 21 the statute of limitations”). However, this exception only applies to “cases in which
 22 new evidence shows it is more likely than not that no reasonable juror would have
 23 convicted [the movant]” in light of the new evidence. *Id.* at 395 (internal citations
 24 omitted). Here, Defendant does not provide the Court with any new evidence of his
 25 innocence, much less evidence that would have made it improbable for a jury to have
 26 convicted him. Instead, Defendant makes unsupported assertions that he is a United
 27 States citizen and that he did not commit the crimes underlying his conviction. (*See*
 28 *generally* ECF Nos. 115, 121.) As such, he is ineligible for the actual innocence

1 exception to the AEDPA's statute of limitations.

2 Because Defendant's motion was filed after the statutory deadline, and
3 because Defendant has failed to demonstrate that he is eligible for equitable tolling
4 or any other exception to the statute of limitations, the Court **DENIES** the motion as
5 time barred.

6 **IT IS SO ORDERED.**

7
8 Dated: May 12, 2021

A handwritten signature in black ink, appearing to read "Dana M. Sabraw", is written over a horizontal line.

Hon. Dana M. Sabraw
United States Chief District Judge